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SURFACE TRANSPORTATION BOARD

Decision

Ex Parte No. 346 (Sub-No. 34)

RAIL GENERAL EXEMPTION AUTHORITY--EXEMPTION
OF HYDRAULIC CEMENT

Decided: April 16, 1997

By decision served December 17, 1996, the Board expanded the previously authorized exemption from regulation of rail shipments of hydraulic cement to encompass a plant at Rapid City, South Dakota owned by the South Dakota State Cement Plant Commission (Dacotah). This decision concluded a proceeding that began on June 26, 1992, when the Association of American Railroads (AAR) filed a petition asking the Interstate Commerce Commission (ICC) to exempt from regulation various commodity groups, including hydraulic cement. Dacotah has been a party to this process from the beginning.

In a decision issued in this matter on July 14, 1995, the ICC found that rail shipments of hydraulic cement were highly competitive, and as a result, it exempted from regulation all hydraulic cement shipments, except for those of Dacotah. The ICC sought further public comment on whether the Dacotah cement plant is in fact rail-captive, as Dacotah had alleged.

Both railroad interests and Dacotah filed further comments with the ICC concerning the competitive climate associated with the Dacotah rail traffic. Before the ICC was able to issue a decision addressing the matter, however, Congress passed the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA). The ICCTA abolished the ICC and transferred certain rail regulatory functions to the Surface Transportation Board (Board). Section 204(b) of the ICCTA provided that proceedings that were pending before the ICC would be transferred to the Board, insofar as they involved functions that were transferred to the Board. Because this proceeding involved a transferred function, it was transferred to the Board. After reviewing the pleadings that had been filed with the ICC, the Board resolved this matter in the decision served December 17, 1996.

In the December 17 decision, the Board found that there were substantial competitive constraints on the railroad serving Dacotah. The Board noted that, as a result of these constraints, the Dacotah traffic historically moved under contract, rather than under the typically higher tariff rates often associated with less competitive traffic. To address Dacotah's assertion that the rates charged on its traffic were higher than those charged generally for hydraulic cement shipments, the Board, as it and the ICC have done in many other proceedings, calculated the average revenue-to-variable cost (R/VC) ratios for hydraulic cement traffic generally, and for Dacotah's traffic in particular. After comparing the two sets of figures, the Board concluded that Dacotah's rates, overall, were lower than the rates charged on hydraulic cement generally. Accordingly, the Board decided to exempt Dacotah's cement traffic from regulation, as the ICC had earlier exempted all other hydraulic cement traffic in its prior decision.

On January 8, 1997, Dacotah petitioned the Board to reconsider and set aside its December 17 decision, claiming that the process by which that decision was reached deprived it of its right to a full and fair hearing. Dacotah's position is that its "due process rights" were violated because it received no notice that the proceeding was before the Board; that the Board improperly undertook its own analysis of R/VC ratios; and that the Board discounted Dacotah's evidence without giving it a chance to present additional evidence or rebut the Board's analysis.

The AAR, on behalf of its members, replied to Dacotah's petition, claiming that it is frivolous and should be summarily dismissed. AAR notes that Dacotah had several opportunities to comment on this matter; that there is no requirement Dacotah be notified specifically of the transfer of a pending proceeding to the Board; and that Dacotah was not harmed by this transfer, as the record had already closed and the statutory criteria were not affected by the transfer of functions.

DISCUSSION AND CONCLUSIONS

A petition to reopen must be supported by a showing of material error, new evidence or changed circumstances. 49 CFR 1115.3(b). See also former 49 U.S.C. 10327 and section 722(c) of the ICCTA. Dacotah does not even address these criteria, except to allege violations of due process. We will discuss Dacotah's arguments briefly.

First, contrary to its claim that it was denied the right to participate, Dacotah has had several opportunities to submit comments on the proposed exemption, and it took advantage of all of them. It submitted comments on November 16, 1993, in response to the ICC's original notice of proposed rulemaking (served October 21, 1993). Later, it submitted two sets of comments, on August 21 and September 13, 1995, in response to the ICC's request for additional submissions specifically addressing Dacotah's situation.

Dacotah suggests that it was prejudiced because the Government did not notify it that the proceeding had been transferred to the Board. The Board, however, had no responsibility to notify parties that individual proceedings had been transferred. As noted above, the transfer occurred by operation of law under the express provisions of the ICCTA. The law itself was notice to Dacotah, and no additional notice was required. Further, the transfer did not prejudice Dacotah. The status of this proceeding on December 31, 1995 (the day before the transfer), was that all comments had been filed, the record was closed, and the case was ready for decision. The status of the proceeding on January 1, 1996 (the day of the transfer), remained the same. The substantive standards under which the proceeding was to be decided remained the same. No further action was required due to the enactment of the ICCTA and, indeed, the only action necessary after the transfer was to issue a decision, which the Board did. Contrary to Dacotah's inference, the mere transfer of this proceeding to the Board does not give Dacotah a right to submit further comments.

Finally, it was not improper for us to perform our own R/VC analysis, particularly given Dacotah's failure to support its

allegations that its traffic moved at R/VC ratios equal to or above national average rates. The fact that we were required to develop evidence that Dacotah failed to submit does not entitle Dacotah to yet another opportunity to submit comments. We are clearly entitled to rely on our own expertise and analysis in this proceeding, as both the Board and the former ICC have frequently done in analogous contexts. We note that Dacotah does not even suggest that its traffic moves above a 180% R/VC ratio; thus, as we noted in the December 17 decision, it does not appear that we would have jurisdiction to entertain rate complaints as to this traffic, even if we were inclined to do so.

In light of the above, we find that the request for reconsideration is without merit and will be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition of Dacotah for reconsideration is denied.

2. This decision is effective on April 23, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary